Yeoh Kim Leng & Ors v Kelapa Sawit (Teluk Anson) Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–116 OF 2006
VT SINGHAM J
12 AUGUST 2008

Civil Procedure — Striking out — Action — No allegations, breaches or wrongdoings made against defendants — Whether plain and obvious case to strike out — Rules of the High Court 1980 O 18 r 19(1)(a)

The second to sixth defendants applied (encl 11) under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff's claim against them. The senior assistant registrar ('SAR') allowed their application and the plaintiff appealed to the judge in chambers (encl 53).

Held, dismissing the appeal with costs with a slight variation to the SAR's order:

(1) The appeal (encl 53) ought to be treated as if the application (encl 11) had never been heard. The matter ought to be taken as though it came up before the judge for the very first time. The judge hearing the appeal ought to exercise his own discretion and not be bound by the SAR's decision. No fresh evidence ought to be admissible unless it satisfied O 56 r 1(3A) of the RHC. The judge may consider all pleadings before him at the time of the appeal, which in the instant case would include the first defendant's defence and the plaintiff's reply to the defence. The function of the court was to see whether the statement of claim disclosed a reasonable cause of action against the second to sixth defendants. There ought to be no adjudication on the merits as no evidence was admissible under O 18 r 19(1)(a) of the RHC. The court ought to consider only the pleadings at a prima facie level and was not permitted to get into a minute examination of the documents (see paras 9–10).

(2) In the instant case, the plaintiffs had not pleaded or alleged any material fact, wrongdoing or breach against the third to sixth defendants even in a summary form. If at all there was any material fact, it was only against the first defendant company and against a deceased director — represented by the second defendant. Thus, this case was obviously

unsustainable against the third to sixth defendants. The pleadings against the third to sixth defendants were without any foundation in law or equity (see paras 15 & 17).

(3) The fact that the second to sixth defendants had not filed the defence was not a ground to oppose their application. The plaintiff could resort to other available remedies for such failure (see para 22).

(4) The plaintiff had merely pleaded that the second to sixth defendants were directors of the first defendant without pleading any breach of fiduciary duty or wrongdoing owed by the defendants to the plaintiff. The defendants could not be sued or brought in on account of allegations against the first defendant company (see para 22).

(5) The plaintiff had not disclosed any reasonable cause of action against the third to sixth defendants and its writ of summons and statement of claim against the third to sixth defendants ought therefore be struck under O 18 r 19(1)(a) of the RHC (see para 28).

[Bahasa Malaysia summary

Defendan kedua hingga keenam memohon (lampiran 11) di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan tuntutan plaintif terhadap mereka. Penolong kanan pendaftar ('PKP') membenarkan permohonan mereka dan plaintif telah merayu kepada hakim dalam kamar (lampiran 53).

Diputuskan, menolak rayuan dengan kos dengan sedikit perubahan kepada perintah PKP:

(1) Rayuan (lampiran 53) patut dianggap seperti permohonan (lampiran 11) tidak pernah didengar. Perkara itu patut dianggap seperti ia dibawa ke hadapan hakim buat pertama kali. Hakim yang mendengar rayuan patut menggunakan budi bicara beliau dan tidak terikat dengan keputusan PKP. Keterangan baru tidak boleh diterima kecuali ia memenuhi A 56 k 1(3A) KMT. Hakim boleh mengambilkira semua pliding di hadapannya pada masa rayuan, yang amna dalam kes ini termasuklah pembelaan defendan pertama dan jawapan pembelaan plaintif. Fungsi mahkamah adalah untuk melihat sama ada penyataan tuntutan menunjukkan kausa tindakan yang munasabah terhadap defendan kedua hingga keenam. Tidak patut ada penghukuman atas merit kerana tiada keterangan yang diterima di bawah A 18 k 19(1)(a) KMT. Mahkamah patut mengambilkira pliding sahaja di peringkat prima facie dan tidak dibenarkan membuat pemeriksaan dokumen secara terperinci (lihat perenggan 9–10).

(2) Dalam kes ini, plaintif-plaintif tidak memplidkan atau mengatakan apa-apa fakta material, kesalahan atau pelanggaran terhadap defendan ketiga hingga keenam walaupun dalam secara terus. Jika terdapat apa-apa fakta material, ia hanya terhadap syarikat defendan pertama dan terhadap pengarah yang telah meninggal dunia — yang diwakili oleh defendan kedua. Oleh itu, kes ini jelas tidak boleh dikekalkan terhadap defendan ketiga hingga keenam. Plaiding terhadap defendan ketiga hingga keenam adalah tidak berasas dari segi undang-undang dan ekuiti (lihat perenggan 15 & 17).

(3) Fakta bahawa defendan kedua hingga keenam tidak memfailkan pembelaan bukan alasan untuk membangkang permohonan mereka. Plaintif boleh merujuk kepada remedi lain yang sedia ada untuk kegagalan sedemikian (lihat perenggan 22).

(4) Plaintif hanya memplidkan bahawa defendan kedua hingga keenam adalah pengarah defendan pertama tanpa memplidkan apa-apa pelanggaran kewajipan fidusiari atau kesalahan yang dilakukan oleh defendan kepada plaintif. Defendan tidak boleh disaman atau diambil tindakan atas pengataan terhadap syarikat defendan pertama (lihat perenggan 22).

(5) Plaintif tidak membuktikan sebarang kausa tindakan yang munasabah terhadap defendan ketiga hingga keenam dan writ saman dan penyataan tuntutannya terhadap defendan ketiga hingga keenam oleh itu patut dibatalkan di bawah A 18 k 19(1)(a) KMT (lihat perenggan 28).]

Notes

For cases on action, striking out, see 3(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6655–6693.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417 (refd)

Bakar bin Ahmad v Subramaniam a/l Kanniah [1992] AMR 47:283 (folld)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (folld)

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener) [1989] 1 MLJ 381 (refd)

Batcha Ammal v Ponnachi [1965] 2 MLJ 43 (refd)

Blay v Pollard & Morris [1930] 1 KB 628 (refd)

Blundell v Rimmer [1971] 1 All ER 1072 (refd)

Bruce v Holdham [1936] 1 KB 697 (refd)

Bruce v Odhams Press Ltd [1936] 1 KB 712 (refd)

Burns v Devon's Iron Works Ltd [1961] SC 102 (refd)

Cook v GS Deeks & Ors [1916] AC 554 (redf)
Evans v Bartlam [1937] 2 All ER 646; [1937] AC 473 (folld)
Farrell v Secretary of State for Defence [1980] WLR 172 (refd)
Foss v Harbottle (1843) 67 ER 189 (folld)
Gold Ores Reduction Company Ltd, The v Parr (1892) 2 QB 14 (refd)
Haji Mohamed Dom v Sakiman [1956] MLJ 45 (refd)
Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498 (folld)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)
Lawrence v Lord Norreys (1890) App Cas 210 (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (folld)
McKay v Essex Area Health Authority [1982] 1 KB 1116 (refd)
Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (folld)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 (refd)
Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors [1995] 2 MLJ 185 (folld)
News Straits Times (M) Bhd v Kumpulan Kertas Niaga [1985] 1 MLJ 227 (folld)
Ng Kian Chong v Saw Seng Kee [1994] 3 MLJ 691 (folld)
Novotel Societe d' Investissements et d' Exploitation Hoteliers & Anor v Pernas Hotel Chain (Selangor) Bhd [1987] 1 MLJ 210 (refd)
Palmco Holdings Bhd v Sakap Commodities (M) Sdn Bhd & Ors [1988] 2 MLJ 624 (refd)
Philips v Philips & Ors (1878) 4 QBD 127 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (folld)
R v Sussex Justices; ex p McCarthy [1924] 1 KB 256 (refd)
Redifussion (Hong Kong Ltd) v AG of Hong Kong [1970] AC 1136 (folld)
Roslan bin Abdullah v New Zealand Insurance Co Ltd [1981] 2 MLJ 324 (folld)
Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378 (refd)
Salomon v Salomon & Co Ltd (1897) AC 22 (folld)
Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors [1998] 1 MLJ 323 (folld)
Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)
Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 (refd)
Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607 (refd)
Tractors (M) Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

William and Humbert v W & H Trade Marks (Jersey) Ltd [1986] 1 AC 368 (refd)
Willis v Earl Beauchamp (1886) 11 PD 59 (refd)
Wright v Prescott Urban District Council [1916] 115 LT 772 (folld)
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250 (refd)
Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors [1985] 2 MLJ 222 (refd)

Legislation referred to
Rules of the High Court 1980 O 6 r 1(3A), O 6 r 3, O 15 r 12, O 18 r 19(1)(a), O 18 r 19(2)

SY Lee (Mohd Noor & SY Lee) for the plaintiffs.
Jenny Saw (Choy & Associates) for the defendants.

VT Singham J:

[1] This is an appeal to the judge in chambers (encl 53) by the plaintiffs against the decision (encl 60) of the learned Senior Assistant Registrar, High Court Ipoh who had on 23 February 2007 allowed the application of the second, third, fourth, fifth and sixth defendants (encl 11) ('the said defendants') to strike out the plaintiffs' claim against the said defendants with costs.

[2] The application of the said defendants (encl 11) to strike out the plaintiffs' claim was made under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC'). Order 18 r 19(1)(a) of the RHC states:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, *on the ground that —*
>
> (a) *it discloses no reasonable causes of action or defence, as the case may be;*
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
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> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.
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> (Emphasis added.)

[3] The plaintiffs' claim against the said defendants and the first defendant company is as pleaded in the statement of claim dated 8 June 2006 which was filed on 8 June 2006 by writ of summons (encl 1).

[4] The statement of claim is as follows:

(1) Pada kesemua masa material plaintif-plaintif No 1, 4 dan 5 dan Yeoh Kheng Hooi, si mati adalah dan masih merupakan pemegang saham dalam defendan pertama bersama-sama defendan-defendan No 3, 4 dan 5 dan Yeoh Kim Pong, si mati dan Beh Swee Hong, si mati.

Plaintiffs Nos 1, 4 and 5 and Yeoh Kheng Hooi, deceased were at all material times and are still shareholders of the first defendant together with the defendant's No 3, 4 and 5 and Yeoh Kim Pong deceased and Beh Swee Hong, deceased.

(2) Pada kesemua masa material defendan-defendan No 3, 4 dan 5 adalah dan masih merupakan pengarah dalam syarikat defendan pertama. Beh Swee Hong, si mati dan Yeoh Kim Pong, si mati juga adalah pengarah dalam syarikat defendan pertama.

Defendants Nos 3, 4 and 5 were at all material time and are still directors of the first defendant company. Beh Swee Hong, deceased and Yeoh Kim Pong, deceased were also directors of the first defendant company.

(3) Defendan pertama ialah sebuah Syarikat Bhd yang ditubuhkan di Malaysia sebagai sebuah syarikat kepunyaan keluarga. Pemegang saham majoriti adalah ahli keluarga ('keluarga tersebut') dua adik-beradik iaitu Yeoh Seow Hung dan Yeoh Kheng Hooi, kedua-duanya telah meninggal dunia.

The first defendant is a limited company incorporated in Malaysia as a family company. The majority of whose shares are held by the families ('the said families') of two brothers, Yeoh Seow Hung and Yeoh Kheng Hooi, both of whom have died.

(4) Dari masa ke semasa saham telah dikeluarkan kepada dua keluarga tersebut sebagai modal untuk mengganti pinjaman daripada atau hutang kepada syarikat kepunyaan salah satu ahli keluarga tersebut.

From time to time shares were issued to the two families as capitalisation of loans or for debts owing to either one of the two families' other companies.

(5) Pada 21 Januari 1977, defendan pertama telah terbit 369 saham kepada Yeoh Kheng Hooi sebagai modal untuk mengganti hutang kepada Joo Siang & Co, dan pembahagian adalah seperti berikut:

Nama	Jumlah saham RM100 setiap satu
Yeoh Kheng Hooi	50

Yeoh Kim Leng	100
Yeoh Gaik Sheang	50
Yeoh Gaik Yong	50
Ng Hong Cheng	119

On 21.1.77, *the first defendant* issued 369 shares to Yeoh Kheng Hooi as capitalisation of the debt due to Joo Siang & Co and the allotment was as follows:

Nama	Jumlah saham RM100 setiap satu
Yeoh Kheng Hooi	50
Yeoh Kim Leng	100
Yeoh Gaik Sheang	50
Yeoh Gaik Yong	50
Ng Hong Cheng	119

(6) Apabila Yeoh Kim Pong mengambil alih sebagai Pengarah Urusan defendan No 1 dia telah mengambil langkah serta-merta untuk membatalkan terbitan 369 saham tersebut kepada Yeoh Kheng Hooi dan keluarganya dan mereka telah diminta untuk mengembali 369 saham tersebut.

When Yeoh Kim Pong took over as the managing director of the first defendant he immediately took steps to cancel the issue of the 369 shares to Yeoh Kheng Hooi and his family and they were asked to return the 369 shares.

(7) 369 saham tersebut telah diperuntukkan dan dipindah milik di Pendaftar Syarikat. Tiga daripada lima pengarah telah menandatangan resolusi meluluskan terbitan 369 saham tersebut tetapi dua pengarah yang lain tidak menandatangan resolusi tersebut.

The 369 shares have been allotted and transmitted to the Registrar of Companies. Three directors out of five have signed the resolution approving the issue of 369 shares but two other directors did not sign the resolution.

(8) Defendan pertama telah memfailkan saman di Mahkamah Tinggi Ipoh Guaman Sivil No 379 tahun 1978 (Kelapa Sawit (Teluk Anson) Sdn Bhd lwn:

(1) Yeoh Kim Leng,

(2) Yeoh Kheng Hooi,

(3) Yeoh Gaik Sheang,

(4) Yeoh Gaik Yong,

(5) Ng Hong Cheng

memohon satu deklarasi untuk membatalkan peruntukan saham tersebut dan untuk menghantar serah sijil saham untuk dibatalkan. Defendan-defendan dalam kes tersebut telah menuntut balas untuk perintah untuk mengesahkan peruntukan saham kepada mereka.

The first defendant's company filed Ipoh High Court Civil Suit No 379 of 1978 Kelapa Sawit (Teluk Anson) Sdn Bhd against

(1) Yeoh Kim Leng,

(2) Yeoh Kheng Hooi,

(3) Yeoh Gaik Sheang,

(4) Yeoh Gaik Yong,

(5) Ng Hong Cheng

for a declaration to invalidate the allotment of the said shares and for the delivery up of the share certificates for cancellation. The defendants in this case counterclaimed for an order to validate the allotment of shares to them. (Emphasis added.)

(9) Defendan pertama telah juga memfailkan saman di Mahkamah Tinggi Ipoh Guaman Sivil No 424 Tahun 1980 Kelapa Sawit (Teluk Anson) Sdn Bhd lwn Yeoh Kheng Hooi untuk bayaran balik jumlah RM22,471.50 sebagai bayaran berlebihan untuk jualan baja oleh Yeoh Kheng Hooi yang berniaga sebagai Joo Siang & Co dan jumlah RM76,602.10 untuk baja yang dikatakan tidak dihantarserah.

The first defendant's company had also filed Ipoh High Court Civil Suits No 424 of 1980 (Kelapa Sawit (Teluk Anson) Sdn Bhd v Yeoh Kheng Hooi) for repayment of the sum of RM22,471.50 as overcharge for sale of fertilizer by Yeoh Kheng Hooi trading as Joo Siang and Co. and the sum of RM76,602.10 charges for fertilizer which was allegedly not delivered.

(10) Dalam pendengaran Mahkamah Tinggi Ipoh Guaman Sivil No 379 Tahun 1978, Yang Arif telah menolak tuntutan plaintif (defendan No 1 dalam kes ini) dan membenarkan tuntutan balas defendan-defendan dalam kes itu.

At the hearing of Ipoh High Court Civil Suit No 379 of 1978, the learned judge dismissed the claim of the plaintiff (the first defendant company herein) and allowed counterclaim of the defendants in that case.

(11) Atas satu rayuan kepada Mahkamah Agung oleh plaintif (defendan No 1 dalam kes ini), Mahkamah Agung telah membenarkan rayuan tetapi telah memutuskan bahawa peruntukan saham telah dipersetujui dan jumlah yang sebenarnya dihutang oleh plaintif (defendan No 1 dalam kes ini) adalah dipertikaikan dan merupakan tajuk guaman sivil (iaitu Mahkamah Tinggi Ipoh Guaman Sivil No 424 Tahun 1980) dan bahawa ia adalah teratur untuk membenar keadilan dijalankan dan

pihak terlibat mematuhi keputusan guaman sivil (iaitu Mahkamah Tinggi di Ipoh Guaman Sivil No 424 Tahun 1980) bila kes diputuskan.

On an appeal to the Supreme Court by the plaintiff (the first defendant company herein), the Supreme Court allowed the appeal but it held that the allotment of shares was agreed and the actual amount that was owed by the plaintiff (the first defendant company herein) was disputed and was the subject of a civil suit (that is Ipoh High Court Civil Suit No 424 of 1980) and that it would be proper to let justice take its own course and the litigating parties abide by the decision of the civil suit (that is Ipoh High Court Civil Suit No 424 of 1980) when it was finally disposed of.

(12) Pada atau lebih kurang 28 Julai 2000 plaintif pertama telah dimaklumkan oleh Penolong Kanan Pendaftar, Mahkamah Tinggi, Ipoh bahawa kes Mahkamah Tinggi Ipoh Guaman No 424 Tahun 1980 telah dibatalkan atas permohonan plaintif (defendan pertama dalam guaman ini) untuk menarik balik kes tersebut.

On or about 28 July 2000, the first plaintiff was informed by the Senior Assistant Registrar of the High Court that on the application of (the first defendant in this suit) to withdraw the case; Ipoh High Court Civil Suit No 424 of 1980 has been struck off.

(13) Permohonan untuk pembatalan kes Mahkamah Tinggi Ipoh Guaman Sivil No 424 Tahuan 1980 tidak dimaklumkan kepada atau dipersetujui oleh defendan-defendan dalam kes tersebut atau plaintif-plaintif dalam kes ini.

The withdrawal of Ipoh High Court Civil suit No 424 of 1980 was without the knowledge or consent of the defendants therein or plaintiffs herein.

(14) Oleh kerana defendan pertama telah tarik kes balik Mahkamah Tinggi Ipoh Guaman Sivil No 424 Tahun 1980, plaintif-plaintif adalah berhak kepada 369 saham dalam defendan pertama.

As the first defendant company has withdrawn Ipoh High Court Civil Suit No 424 of 1980, the plaintiffs are therefore entitled to the 369 shares in the first defendant company.

MAKA plaintif-plaintif menuntut bahawa:-

WHEREFORE the plaintiffs claim:-

(a) Satu deklarasi bahawa 369 saham telah diperuntukkan kepada plaintif-plaintif dalam syarikat defendan pertama dan satu perintah bahawa 369 saham diperuntukkan dan diterbitkan dalam bahagian seperti yang dinyatakan dalam perenggan 5 pernyataan tuntutan;

A declaration that the 369 shares were allotted to the plaintiffs in *the first defendant company* and an order that the 369 shares be allotted and issued in the proportion as stated in para 5 of the statement of claim.

(b) Satu perintah bahawa defendan-defendan memberi plaintif-plaintif kesemua dividen yang patut dibayar kepada plaintif-plaintif oleh defendan No 1 berkenaan 369 saham, isu saham bonus dan isu saham 'rights' (sekiranya ada) yang diperuntukkan kepada 369 saham tersebut dari tarikh peruntukan iaitu 21 Januari 1977 sehingga tarikh penghakiman;

An order that the defendants give to the plaintiffs all dividends that would have been paid to the plaintiffs by *the first defendant company* in respect of the 369 shares, bonus issue and rights issue (if any) allocated to the 369 shares from the date of allotment, that is 21 January 77 up to date of judgment;

(c) Satu perintah bahawa defendan-defendan membayar faedah kepada plaintif-plaintif faedah pada kadar 8% setahun atas keseluruh dividen yang diumumkan sehingga kini oleh defendan No 1 dan yang kena dibayar kepada plaintif-plaintif berkenaan 369 saham tersebut;

An order that the defendants pay interests to the plaintiffs' at 8% per annum on all the dividends declared so far by the first defendant and which would have been paid to the plaintiffs in respect of the 369 shares.

(d) Kos;

Costs; and/dan

(e) Selanjutnya dan relif lain yang mahkamah ini dianggap sesuai untuk diberi.

Such further and other relief as this court may deem fit to give.

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DECISION

[5] Upon perusing the statement of claim, this court finds that it has no doubt disclosed details of a long history to this claim. However, this court finds that there is absolutely no wrongdoing or breach which has been pleaded or alleged nor has it disclosed any cause of action against the said defendants, namely, the third, fourth, fifth and sixth defendant. Paragraphs 1 and 2 of the statement of claim merely states that the third, fourth and fifth defendants are the shareholders and directors of the first defendant company and Yeoh Kim Pong, deceased and Beh Swee Hong, deceased whose estate are now represented by the second and sixth defendant respectively are also the shareholders of the first defendant company. Nevertheless, there appears to be some allegations pleaded against Yeoh Kim Pong, deceased whose estate is now represented by the second defendant and this is contained in paragraph

6 of the statement of claim and this fact may have some bearing against the second defendant by virtue of being the representative of the estate of the said Yeoh Kim Pong, deceased.

[6] It is important to state at this stage that at the time when the learned senior assistant registrar ('SAR') had allowed the application (encl 11) of the said defendants on 23 February 2007, there was no statement of defence or any other pleadings having been filed. The only pleading that was available at the time was the writ of summons and the statement of claim (encl 1). Accordingly, the learned SAR had considered only the statement of claim as that was the only pleading available at the time and she had to determine if the statement of claim has disclosed a reasonable cause of action against the said defendants as provided under O 18 r 19(1)(a) of the RHC. She found there was in fact no reasonable cause of action against them. Accordingly, the learned SAR allowed with costs the application (encl 11) of the said defendants and ordered the statement of claim to be struck off.

PLEADINGS

[7] It is important to state that the object of pleadings is basically to assist the parties to define the issues between them. In doing so, it would enable the court to adjudicate the action within the four corners of the pleadings. In *Farrell v Secretary of State for Defence* [1980] WLR 172, at p 180, Lord Edmund Davies said:

> It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. *But pleadings continue to play essential part in civil actions*, and although there has been since the Civil Procedure Act 1883 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least necessitate an adjournment which may prove unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. *For the primary purpose of pleadings remains and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.*
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> (Emphasis added.)

[8] The importance of pleadings becomes obvious and evident for the parties to find that their case is confined to the issue raised therein and it has further established the principles that the court must decide only on the issue raised by the pleadings. In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J said at pp 196–197:

A It should be realised that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance. No such issue arose on the pleadings. A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the B contentions of the parties to the action. In the words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. *The court is not entitled to decide a 'suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case* C *for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.* If the parties agree to a factual position then it is hardly open to the court to come to a find into, D different from such agreed facts. *The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.*

It was not open to the learned Magistrate to fly off at a tangent as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and E *proper.* It was held by Scrutton LJ in the case of *Blay v Pollard & Morris* [1930] 1 KB 628 at p 634:

> Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the F issue on which the Judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 where Sir Charles Mathew CJ said:

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> I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself H *liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done.* These rules are meant to be observed and respected. The faith and the confidence of the public in I the law, the Constitution and the Government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The order of the learned magistrate is set aside and the case is sent back to be tried by another magistrate with the direction that he should hear and decide the case on the issues raised in the pleadings (see *Novotel Societe d' Investissements et d' Exploitation Hoteliers & Anor v Pernas Hotel Chain (Selangor) Bhd* [1987] 1 MLJ 210).

If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial... any fact which is not stated in the pleadings (see *Philipps v Philipps* (1878) 4 QBD 127) (see also *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416).

Emphasis added.)

[9] Be that as it may, this appeal to judge in chambers (encl 53) is considered or treated as if the summons in chambers (encl 11) had never been previously heard and the matter is taken as though it has come up before the judge for the very first time (see *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; *Blundell v Rimmer* [1971] 1 All ER 1072, *Evans v Bartlam* [1937] 2 All ER 646; [1937] AC 473, *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) and Ors* [1995] 2 MLJ 185 at p 194). The judge who hears this appeal ought to exercise an independent discretion of his own and does not give any weight to the decision of the learned SAR. The procedural consequences of this approach are, either side could rely on pleadings which have been subsequently filed which were not available before the Registrar. However, no fresh evidence is admissible on the hearing of the appeal unless the condition or tests set out in O 6 r 1(3A) of the RHC is satisfied. Therefore, at this stage of the hearing of this appeal to the judge in chambers, this court may be able to consider all the pleadings that are before this court at the time of hearing this appeal which this court now find includes the statement of defence of the first defendant (encl 58) having been filed on 27 March 2007 and a reply to the statement of defence of the first defendant (encl 61) having been filed on 6 April 2007. However, for the purpose of the application (encl 11) under O 18 r 19(1)(a) of the RHC, this court has considered the statement of claim in so far as the second, third, fourth, fifth, and sixth defendants.

[10] The function of this court at this stage of the hearing of the appeal to the judge in chamber is to see, whether the statement of claim has disclosed a reasonable cause of action on the face of it against the second, third, fourth, fifth and sixth defendants. There is no adjudication on the merits of the claim as pleaded in the statement of claim as no evidence is admissible under O 18 r 19(1)(a) of the RHC, which is relied on in this application (encl 11) (see O 18 r 19(2) of the RHC). In other words, this court has to consider only the pleadings at a prima facie level and is not permitted to get into a minute examination of the documents (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).

[11] In any event, as stated above, there is no affidavit evidence to be considered in this application (encl 11) (see O 18 r 19(2) of the RHC; *Zakaria bin Mohamed Esa v Dato Abdul Aziz bin Ahmad & Ors* [1985] 2 MLJ 222; *Redifussion (Hong Kong Ltd) v AG of Hong Kong* [1970] AC 1136).

[12] In the instant case, as stated above, the plaintiffs have not pleaded or alleged any material facts or any wrongdoings or breach against the said defendants, namely, the third, fourth, fifth and sixth defendants even in a summary form for the purpose of maintaining a cause of action sufficient to put the said defendants on guard as to what they have to meet (see *Bruce v Holdham* [1936] 1 KB 697; *Batcha Ammal v Ponnachi* [1965] 2 MLJ 43). If at all there is any material fact as pleaded or raised in the statement of claim, it is only against the first defendant company and perhaps, against Yeoh Kim Pong, deceased whose estate is now represented by the second defendant when considering para 6 of the statement of claim. There is absolutely no material fact or wrongdoings or any breach which have been pleaded or alleged against the other said defendants for this claim to be sustained.

[13] In *Bruce v Odhams Press Ltd* [1936] 1 KB 712, Scott LJ has defined the word 'material' as follows:

> The word 'material' means necessary for the purpose of formulating a complete cause of action, and if any 'one material fact is omitted, the statement of claim is bad.

[14] In *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250, Chong Siew Fai J (as he then was) said:

> All facts that are essential to constitute a cause of action must be alleged. *Philipps v Philipps & Ors* (1878) 4 QBD 127 stated the general rule as follows at p 139:
>
> > But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on trial.

[15] On the face of the statement of claim, this court, with respect, regrets to state that this court is unable to find any material facts or any wrongdoings or any breach which has been alleged against the said defendants, namely, the third, fourth, fifth and sixth defendants. Accordingly, it must necessarily be a case which is plainly and obviously unsustainable in so far as the said defendants, namely, the third, fourth, fifth and sixth defendants (see *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; *Roslan bin Abdullah v New Zealand Insurance Co Ltd* [1981] 2 MLJ 324). In *Wright v Prescot Urban District Council* [1916] 115 LT 772 Nevell J said at p 773:

> ... if when pleadings are delivered the other side think that they disclose no cause of action, or no defence, to the action at law, the court may strike them out...

However, the power to strike out the statement of claim is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. (See *Lawrence v Lord Norreys* (1890) AC 210 at p 219) or in cases where it is obvious that the claim is devoid of all merits or cannot possibly succeed on the pleadings (see *Willis v Earl Beauclamp* [1886] 11 PD 59). (See also *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691. *William and Humbert v W & H Trade Marks (Jersey) Ltd* [1986] 1 AC 368 at pp 435–436).

[16] This court also finds that the pleadings regrettably does not disclose any cause of action or even raise some question or issue against the said defendants on a prima facie level for it to be decided so that it should be set down for argument. On the other hand, this court is mindful that however weak or the chances of success is slim and not likely to succeed itself is not a ground to strike out the pleadings (see *Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 323; *News Straits Times (M) Bhd v Kumpulan Kertas Niaga* [1985] 1 MLJ 227; *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, *Ng Kian Chong v Saw Seng Kee* [1994] 3 MLJ 691 di ms 699). However, on the facts and the pleadings in the instant case, this court finds there is nothing which has been alleged against the said defendants namely the third, fourth, fifth, and sixth, defendants for them to answer and which justifies a trial:

> I shall like to make it clear that though the facts for any given case may sometimes give rise to all sorts of speculative issues, however, at the end of the day, it is only the issues, whether on questions of law or fact, which are specifically and actually raised or pleaded that invite the adjudication by the court which cannot go out side the pleadings or statements in the nature of the pleadings' (per Peh Swee Chin H (as he then was) in *Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, intervener)* [1989] 1 MLJ 38 di ms 382).
>
> It is most important that a defendant should know from the writ what the exact claim against him (per Mathew H in *The Gold Ores Reduction Co v Parr* [1982] 2 QB 14).

[17] This court further finds that there are also no issues raised or pleaded to be determined through discovery process or cross-examination of witnesses or anything to implicate the said defendants namely, the third, fourth, fifth and sixth defendants. In other words, regrettably, the pleadings in so far as the defendants, namely, the third, fourth, fifth and sixth defendants, it is without any foundation in law or equity (see *Honan Plantation Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 2 MLJ 498). In essence, the material fact which

A can be derived or gathered from the pleadings is basically only against the first defendant and if at all it may have some bearing against Yeoh Kim Pong, deceased whose estate is now represented by the second defendant.

B **[18]** This court wishes to make it clear that this court will not be too quick to strike out a pleading or the statement of claim if the ground raised to strike it out is merely for non-compliance with procedural requirement or if a prima facie for investigation is made out as 'rigid justice is the greatest injustice'. In *Bakar bin Ahmad v Subramaniam a/l Kanniah* [1992] AMR 47:283; His Lordship Edgar Joseph Jr (as then he was) said:

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> What is reasonable … as long as the statement of claim including any particular discloses some cause of action or some question fit to be decided by the court, whether it be a question of law or fact or of mixed fact and law, the action should be allowed to proceed.

D

[19] Nevertheless, each case should be determined on its own sets of facts and circumstances. On the other hand, the statement of claim in the instant case as stated above, does not contain material facts or wrongdoings or any E breach against the said defendants, namely, the third, fourth, fifth and sixth defendants and all the facts and allegations are solely directed against the first defendant company. Even if the plaintiffs were attempting to pierce the veil as submitted by learned counsel for the plaintiffs since the first defendant company and the directors are separate and distinct entity, the pleadings or F the statement of claim must at least contain some material facts or wrongdoings or breach alleged against the said defendants which in the considered view of this court does not appear to be so as far as the third, fourth, fifth and sixth defendants. Even if this court were to look at the history of this case as pleaded in the statement of claim, it still does not G disclose a reasonable cause of action against the third, fourth, fifth and sixth defendants.

[20] This court is mindful that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and it H should be exercised with utmost caution (see *Tractors (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1; *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). Nevertheless, the court would strike out a statement of claim or pleadings in plain and obvious cases where the I statement of claim does not disclose any grounds of action or where there is absence of conflict of material or any wrongdoings (see *McKay v Essex Area Health Authority* [1982] 1 KB 1116; *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87). This court wish to make it clear that this is not a case where the pleadings are not so satisfactory which perhaps may

arguably require a certain degree of flexibility but this is not such a case but is a case which does not contain any allegations against the third, fourth, apart the said fifth, and sixth defendants for them to answer.

[21] On the other hand, even if this court were to consider the plaintiffs' claim as a derivative action, being an exception to the rule as in *Foss v Harbottle* (1843) 67 ER 189, or a representative action it must still be expressly pleaded or alternatively pleaded whether it is a representative action (see *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; O 6 r 3 and O 15 r 12 of the RHC; *Palmco Holdings Bhd v Sakap Commodities (M) Sdn Bhd & Ors* [1988] 2 MLJ 624 at p 629).

[22] As to the fact that the said defendants have not filed statement of defence as raised by learned counsel for the plaintiffs, this court is of the considered view that, that is not a ground available to oppose the application to strike out the plaintiffs' statement of claim under O 18 r 19(1)(a) as disclosing no reasonable cause of action. This court is of the considered view that there may be other remedies available to the plaintiffs under the RHC for the failure of the said defendants for not filing statement of defence and it is not by way of opposing the application to strike out the plaintiffs' claim against the said defendants which is under O 18 r 19(1)(a) of the RHC. It is also important to reiterate that the first defendant company and the directors are separate and distinct legal entity (see *Salomon v Salomon & Co Ltd* (1897) AC 22). The plaintiffs have merely pleaded that the said defendants namely, the second, third, fourth and fifth are directors of the first defendant company. Since there is no allegation expressly pleaded of any wrongdoing or of any fiduciary duty owed by the said defendants to the plaintiffs, the said defendants cannot be sued or brought in willy nilly on account of allegations against the first defendant company.

[23] In *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378 (PC) the defendant who was the managing director and principle shareholder was sued by the plaintiff as it was pleaded that the defendant had dishonestly caused or permitted the company to pay its own account money which it should have kept a separate account on trust for the plaintiff. The plaintiff sued the managing director for the money owed to it by the company based on those alleged pleading. It was held that a liability and equity to make good the resulting loss attaches to a person who dishonestly procure or assists in a breach of trust or fiduciary obligation. However, in the instant case, there is absolutely no allegation or any breach or wrongdoings by third, fourth, fifth and sixth defendants (see *Cook v GS Deeks & Ors* [1916] AC 554). It is not the function of this court to assume that the said defendants must necessarily be the agent as well as trustee of the first defendant company or their relationship is that of a principle and agent as the

duties of directors can vary in scope and nature or that the directors must have derived some benefit from certain transaction to the detriment of the minority or shareholders unless the same is expressly pleaded which none exist in the instant case.

[24] The rule in *Foss v Harbottle* (1843) 67 ER 189 does not apply or to consider the plaintiffs' claim to become a derivative action which is an exception as in *Foss v Harbottle* as it was not pleaded in the statement of claim that it is a derivative action nor has it recited the facts or any wrongdoings or that the action is brought for the benefit of the company named as the first defendant (see *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417). There is also no allegation against the said defendants that they had acted to the detriment of the first defendant company or had placed themselves in conflict between their duties to the first defendant company and their personal interest or duty to others in order to bring them within the scope of fiduciary duties to the first defendant company.

[25] However, this court has considered whether the failure to plead expressly any wrongdoing or breach of any improper dealings allegedly committed towards the plaintiffs by the said defendants can be regarded as technical objection or apply the maxim *diminis non curat lex*. Regrettably, this court is of the considered view that on the facts and the pleadings, the maxim has no application as failure to plead any wrongdoing or breach of duty can never be a trifling matter or omission as the said defendants must be put on notice of any wrongdoings to enable them to effectively answer the allegation by their statement of defence (see *Burns v Devon's Iron Works Ltd* [1961] SC 102). In fact, it is important to state that the discretion by the court must be exercised judicially to be meaningful and effective as judicial office is essential a public trust. This function invariably is an inescapable judicial task and is not an exercise of whim or will to please or oblige any particular party or litigant. It is worth reminding ourselves of judicial fairness and it is of a fundamental importance that justice should both be done and manifestly seen to be done (see *R v Sussex Justices; ex p McCarthy* [1924] 1 KB 256). Indeed, fairness is what justice really is.

[26] This court finds that the plaintiffs have merely pleaded that the said defendants, namely, the third, fourth and fifth defendants are directors of the first defendant company. There is not even any allegation or material facts pleaded that being the directors, they are deemed to be in control or responsible for the acts or alleged wrongdoings of the first defendant company. It is merely pleaded in para 2 of the statement of claim that the said defendants, namely, the third, fourth and fifth defendants are directors without pleading anything more and is insufficient to raise any reasonable

cause of action against them. Therefore, it is most unreasonable and unfair to allow the said defendants to remain as defendants who are sued by the plaintiffs without any material facts or allegation expressly having been pleaded against them.

[27] As to the ground of delay and laches and that the plaintiffs have no locus standi to file this action as submitted by learned counsel for the defendants, this court is of the considered view that it is unnecessary for this court to decide on those complaints since the main crux of the said defendants' complaints is that there is no reasonable cause of action against the said defendants and there is no allegation of any wrongdoing or any breach of fiduciary duty which been pleaded against the said defendants.

[28] On going through the statement of claim (encl 1), the written submission supported with authorities filed by both parties and the cases highlighted by this court and the oral submission on 25 July 2008, this court with respect, finds that there is absolutely no allegation of any wrongdoings or breach which has been pleaded or alleged in the statement of claim against the third, fourth, fifth and sixth defendants or even the reply (encl 61) which are all part of the pleadings. Consequently, this court is in agreement with the contention of learned counsel for the said defendants that the plaintiffs have not disclosed any reasonable cause of action against the said defendants, particularly against the third, fourth, fifth, and sixth defendants and the writ of summons ought to be struck out. In the circumstance, this court finds that this is an appropriate case to apply O 18 r 19(1)(a) of the RHC to strike out the statement of claim against the third, fourth, fifth, and sixth defendants as having not disclosed a reasonable cause of action.

[29] Accordingly, the appeal by the plaintiffs against the decision of the learned SAR who had struck out the statement of claim against the third, fourth, fifth and sixth defendants is dismissed with costs with a variation that the claim against the second defendant is allowed to be maintained together with the first defendant company for reasons stated as above.

Appeal dismissed with costs with slight variation to the SAR's order.

Reported by Andrew Christopher Simon